88-1131

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

HARBOR INSURANCE COMPANY,

Petitioner,

v.

TRAMMELL CROW, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

P. MICHAEL JUNG
STRASBURGER & PRICE
4300 First RepublicBank Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724

Counsel of Record

Of Counsel:

LUTHER MUNFORD
Special Counsel to
Phelps, Dunbar, Marks,
Claverie & Sims
2829 Lakeland Drive
P.O. Box 55507
Jackson, Mississippi 39216-1507

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QUESTION PRESENTED

Because the appealability of a judgment "should above all be clear," this Court in *Budinich v. Becton Dickinson & Co.*, ___ U.S. ___, 108 S. Ct. 1717, 1722 (1988), adopted the "bright-line rule" that a district court judgment which disposes of all issues except a claim for attorneys' fees is final for purposes of appeal.

The question presented in this petition is whether the Court of Appeals properly created an exception to *Budinich* based on the district court's use of the label "Interlocutory Judgment," when it is well established in other circuits that such a label is not controlling, because appealability depends not on an order's label but on its substantial nature and effect.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Harbor Insurance Company and the respondents Trammell Crow and The Chasewood Construction Company. The Court of Appeals' denomination of Trammell Crow Company, Inc., as a party was in error.

Petitioner Harbor Insurance Company is a member of the Continental Group of insurance companies. Its parent corporation is The Continental Corporation. Its affiliates are:

American Loyalty Insurance Company
Bayside Reinsurance Company, Limited
Boston Old Colony Insurance Company
The Buckeye Union Insurance Company
Commercial Insurance Company of Newark, New Jersey
Commercial Life Insurance Company
The Continental Insurance Company of New Jersey
Continental Insurance Co. (Europe), Ltd.
Continental Insurance Co. (U.K.), Ltd.
Continental Insurance Company of Canada
Continental International Life Insurance Company
Continental Life Insurance, PLC
Continental Life (Int'l), Ltd.
Continental National Life Insurance Company
Continental Reinsurance Corp., Int'l, Ltd.
Continental Reinsurance Corp. (U.K.), Ltd.
Continental Reinsurance Corporation
Deutsch Continental Reinsurance, A.G.
Dominion Insurance Corporation
East River Insurance Company (Bermuda), Ltd.
East River Insurance Company, Ltd.
The Fidelity and Casualty Company of New York
Firemen's Insurance Company of Newark, New Jersey

LIST OF PARTIES AND RULE 28.1 LIST (Cont.)

First Commercial Life Insurance Company
First Fire and Casualty Insurance of Hawaii, Inc.
First Indemnity Insurance Company of Hawaii, Inc.
First Insurance Company of Hawaii, Ltd.
The Glens Falls Insurance Company
Inter-Continental Seguradora S.A.
Ivanhoe Reinsurance Company, Ltd.
Kansas City Fire and Marine Insurance Company
Loyalty Life Insurance Company
The Mayflower Insurance Company, Ltd.
National-Ben Franklin Insurance Company of Illinois
Niagara Fire Insurance Company
Pan American Insurance Company
Preferred Risk Insurance Company
Security National Life Insurance Company of Puerto Rico
Unionamerica Insurance Co., Ltd.
William Penn Life Assurance Company of America
William Penn Life Insurance Company of New York
Workers' Compensation and Indemnity Company of California

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No. _____

In The

Supreme Court of the United States

October Term, 1988

HARBOR INSURANCE COMPANY,

Petitioner,

v.

TRAMMELL CROW, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Harbor Insurance Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 6, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 854 F.2d 94. It is reprinted in the appendix to this petition at pp. A-1-13.

The memorandum order of the United States District Court for the Northern District of Texas has not been reported. It is reprinted in the appendix to this petition at pp. A-16-28.

JURISDICTION

The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291; the timeliness of the notice of appeal to that court is the gravamen of this petition. The opinion and judgment of the Court of Appeals were entered on September 6, 1988. A petition for rehearing was timely filed on September 20, 1988, and was denied on October 4, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1291 states in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

The jurisdiction of the district court was based on diversity of citizenship under 28 U.S.C. § 1332, the plaintiff being a citizen of California and the defendants being citizens of Texas.

The petitioner Harbor Insurance Company ("Harbor") brought this suit against the respondents, who are the insured parties under an excess liability insurance policy written by Harbor. Harbor sought a declaratory judgment that it had received late notice of an earlier state court suit against the respondents, and therefore was not obligated to pay the judgment in that suit. Harbor also sought recovery of its attorneys' fees under the federal and state declaratory judgment acts. (R. 1-50). The respondents counterclaimed for the amount of the state court judgment, plus exemplary damages and attorneys' fees. (R. 172-85). Harbor moved for summary judgment; this motion was granted by the district court in an unpublished memorandum order. (R. 652-64; pp. A-16-28, *infra*).

On September 30, 1987, the district court rendered a judgment (R. 672-73; pp. A-29-30, *infra*), labelled "Interlocutory Judgment," in which it awarded Harbor a declaratory judgment of non-liability and directed that the respondents take nothing from Harbor. The judgment also contained the following paragraph:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment is an Interlocutory Judgment only and shall have no effect whatsoever on Harbor's claim for attorney's fees, which claim shall be heard at the time and in the manner required by future Orders of this Court.

This judgment was set forth on a separate document as required by Fed. R. Civ. P. 58, and was entered on the docket sheet by the clerk in accordance with Fed. R. Civ. P. 58 and 79(a) and Fed. R. App. P. 4(a)(6). Simultaneously with its Interlocutory Judgment, the court referred Harbor's attorneys' fees claim to a magistrate (by consent of the parties) for hearing and for the entry of judgment. (R. 236).

The magistrate issued his findings and conclusions regarding the attorneys' fees claim on October 21, 1987. (R. 708-09). He simultaneously rendered a judgment, which incorporated the relief awarded in the September 30 judgment and additionally awarded $67,747.50 in attorneys' fees to Harbor. (R. 710-11; pp. A-31-32, *infra*).

The respondents' notice of appeal to the Court of Appeals under 28 U.S.C. § 636(c)(3) was filed on November 19, 1987, less than thirty days from the October 21 judgment but more than thirty days from the September 30 judgment. (R. 712-13). The Court of Appeals held that the October 21 judgment was the operative final judgment for appellate purposes and accordingly held the notice of appeal to have been timely. It went on to reverse the summary judgment.

REASONS FOR GRANTING THE WRIT

In *Budinich v. Becton Dickinson & Co.*, ___ U.S. ___, 108 S. Ct. 1717 (1988), this Court unanimously held that a judgment which resolves all of the issues in a case except for a claim for attorneys' fees is a final and appealable judgment under 28 U.S.C. § 1291. Because the notice of

appeal in that case was timely as to an order which resolved the attorneys' fees claim, but untimely as to the judgment which resolved the merits of the case, the Court held that only the attorneys' fees claim was properly brought forward for appellate review, and affirmed the dismissal of the appeal as to the merits.

In deciding the nature of the rule which should govern the appealability of judgments in cases involving attorneys' fees claims, the *Budinich* Court was faced with a policy choice between two competing lines of authority. Under one approach, exemplified by *Holmes v. J. Ray McDermott & Co.*, 682 F.2d 1143, 1146 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983), appealability was made to depend on a theoretical analysis of whether the attorneys' fees entitlement at issue was integral to or collateral to the merits of the action. Under the other approach, exemplified by *International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers' Local Union 75 v. Madison Industries, Inc.*, 733 F.2d 656, 658 (9th Cir. 1984), a bright-line test was employed under which all attorneys' fees entitlements were classified as collateral to the merits for appealability purposes.

In choosing between these conflicting approaches, the *Budinich* Court gave greatest weight to considerations "that pertain to the smooth functioning of our judicial system." ___ U.S. ___, 108 S. Ct. at 1721, *quoting Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948). It stressed the need for "operational consistency and predictability in the overall application of § 1291," believing that "[t]he time of appealability, having jurisdictional consequences, should above all be clear." ___ U.S. ___, 108 S. Ct. at 1721. For these reasons, the Court chose the

Ninth and Tenth Circuit "bright-line rule" over the Fifth Circuit "integral vs. collateral" rule, which depended on a complex and uncertain analysis of the character of the attorneys' fees entitlement in each individual case.

Under the *Budinich* rule, the September 30 judgment in this case was unquestionably final and subject to appeal, and the November 19 notice of appeal was unquestionably untimely as to all issues except Harbor's attorneys' fees claim. The Court of Appeals held, however, that this result was altered by the title of the September 30 judgment as an "Interlocutory Judgment" and by the statement in the text of that judgment that "this Judgment is an Interlocutory Judgment only." *See* p. A-7, *infra*. By creating an exception to *Budinich* based on the existence of these labels, the Court of Appeals has undermined the rule adopted in *Budinich*, interjecting harmful uncertainty into jurisdictional law where there is a manifest need for clarity and predictability. In doing so, it has also disregarded a considerable body of precedent which elevates the substance of an order over its label in analyzing the question of appealability.

I. THE FIFTH CIRCUIT'S DECISION IN THIS CASE UNDERMINES THE "BRIGHT-LINE" TEST OF *BUDINICH* AND THEREBY CREATES NEEDLESS JURISDICTIONAL UNCERTAINTY.

In *Budinich*, this Court eschewed the Fifth Circuit's focus on analytical niceties in favor of a practical and predictable approach to appealability. In the present case, the Fifth Circuit, by creating an exception to the *Budinich*

bright-line rule, has returned to the same type of complexity and uncertainty which this Court sought to eliminate in *Budinich*.

Under *Budinich*, the appealability of a judgment turns on a clear and easily applied test: does the judgment dispose of the entire merits of the case? In contrast, under the Fifth Circuit's new exception to *Budinich*, a putative appellant (and the appellate court) must analyze a judgment not only to determine whether it resolves all merits issues, but also to ascertain whether the district court subjectively intended that it be appealable. Unlike the *Budinich* test, this "subjective intent" analysis will be fraught with uncertainty and opportunity for error.[1] Like the analytical framework abandoned in *Budinich*, the "subjective intent rule" will result in unnecessary satellite litigation and in the loss of the right to appeal if an appellant guesses wrongly.

The Fifth Circuit's new exception to *Budinich* was unnecessary to permit a district court to exercise control over the appealability of its judgments, inasmuch as a

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[1] This case illustrates the difficulty of ascertaining a district court's intent as to appealability. While the Fifth Circuit took for granted that the district court intended its judgment in this case to be unappealable, that proposition is doubtful at best. Fed. R. Civ. P. 54(a) defines a "judgment" to include a decree "and any order from which an appeal lies." "Interlocutory" refers to a decision "which decides some point or matter, but is not a final decision of the whole controversy." Black's Law Dictionary 731 (5th ed. 1979). Hence the district court's terminology indicates an intent that the order in question be an "appealable order which is not a final decision of the whole controversy." That characterization comports precisely with the holding of *Budinich*.

mechanism for such control already exists under the Federal Rules of Civil Procedure. That mechanism is to be found in the "separate document" requirement of Fed. R. Civ. P. 58, which was specifically adopted to eliminate the theretofore prevalent uncertainty as to whether a district court intended a memorandum opinion to constitute a final decision.[2] The "separate document" requirement shifted the focus from the district court's subjective intent to a clearly ascertainable objective manifestation of finality. This Court has stressed that the requirement "must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." *United States v. Indrelunas*, 411 U.S. 216, 222 (1973). Rule 58 provides a simple and convenient mechanism for a district court which wishes to retain control over an otherwise final decision, without resort to the clumsy and confusing expedient of labeling the judgment interlocutory when this Court has unanimously ruled that it is final.

Budinich did not mark this Court's first effort to bring added predictability to appellate jurisdictional rules, nor its last. From the "separate document" requirement of Fed. R. Civ. P. 58 to the rules making the clerk's

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[2] *Compare United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232 (1958) (no "separate document" requirement notwithstanding uncertainty in ascertaining district judge's intent), *with* Advisory Committee Note to 1963 Amendment to Fed. R. Civ. P. 58 ("separate document" requirement imposed to eliminate such uncertainty), *reprinted in* 6A J. Moore, J. Lucas, & J. Grotheer, *Moore's Federal Practice* ¶ 58.01[8] (2d ed. 1987).

entry of the judgment on the docket the operative jurisdictional event[3] to this Court's recent decisions in *Budinich, Buchanan v. Stanships, Inc.*, ___ U.S. ___, 108 S. Ct. 1130 (1988) (motion for costs does not defer appellate timetable under Fed. R. App. P. 4(a)(4)), and *Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405 (1988) (*"et al."* appeal bond ineffective to perfect appeal on behalf of unnamed parties), the Court has striven to make this an area where "bright-line" jurisprudence prevails to the exclusion of subjective, case-specific, and error-prone rules. The Fifth Circuit's decision in this case is a setback for that process and deserves correction by this Court.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS THAT THE LABEL "INTERLOCUTORY JUDGMENT" IS NOT CONTROLLING, BECAUSE APPEALABILITY DEPENDS NOT ON AN ORDER'S LABEL BUT ON ITS SUBSTANTIAL NATURE AND EFFECT.

In according controlling significance to the "interlocutory" label applied to the judgment by the district court, the Court of Appeals departed from existing jurisprudence, under which the appealability of a judgment "depends not on its name, its propriety or its normal function but rather upon the determination or refusal to determine a justiciable issue. . . ." *Manufacturers Casualty Insurance Co. v. Arapahoe Drilling Co.*, 267 F.2d 5, 7 (10th

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[3] Fed. R. App. P. 4(a)(6); *see* Fed. R. Civ. P. 58.

Cir. 1959).[4] In particular, the Fifth Circuit's decision in this case is inconsistent with the Sixth Circuit's decision in *Delta Drilling Co. v. Arnett*, 186 F.2d 481, 482-83 (6th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951). In the *Delta Drilling* case, a judgment which disposed of all non-incidental issues was held to be final and appealable notwithstanding its label as an "Interlocutory Order and Judgment," and an appeal from a later judgment was held not to bring forward the earlier judgment for review. Thus *Delta Drilling*, coupled with *Budinich*, dictated a dismissal of the appeal in this case as to all but the attorneys' fees issue.

The principle that the trial court's use of an "interlocutory" label is to be disregarded in analyzing appellate finality has likewise been repeatedly established in

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[4] *Accord, Jacobsen v. Jacobsen*, 126 F.2d 13, 15 (D.C. Cir. 1942); *see The Attualita*, 238 F. 909, 910-11 (4th Cir. 1916) (appealability of a judgment "is not determined by the name which the court below gives it, but is to be decided by the appellate court on consideration of the essence of what is done"); *cf. Audi Vision Inc. v. RCA Manufacturing Co.*, 136 F.2d 621, 623 (2d Cir. 1943) (appealability "is a matter for the appellate court to decide, whatever may have been the view of the trial court").

other federal[5] and state[6] cases. Unless corrected by this Court, the Court of Appeals' decision in this case will cast doubt on the continuing vitality of this long line of precedents.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case and the case should be set for briefing and argument.

In the alternative, a writ of certiorari should be granted, the judgment of the Court of Appeals should be summarily reversed, and judgment should be rendered

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[5] *Bennell Realty Co. v. E. G. Shinner & Co.*, 74 F.2d 491, 493 (7th Cir. 1935) (decree interlocutory in form which settles principal matter in controversy is final); *Mercantile Trust Co. v. Chicago, P. & St. L. Railway Co.*, 123 F. 389, 392 (7th Cir. 1903) (statement by district court that order is interlocutory is not conclusive if the order finally determines the rights of the parties); *Potter v. Beal*, 50 F. 860, 863 (1st Cir. 1892) (even though order labeled preliminary by district court, finality to be determined by the essence of what is done).

[6] *E.g., Eldridge v. Burns*, 76 Cal. App. 3d 396, 142 Cal. Rptr. 845, 849-50 (1978); *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit District*, 65 Cal. App. 3d 121, 135 Cal. Rptr. 192, 196 (1976); *Altschuler v. Altschuler*, 399 Ill. 559, 78 N.E.2d 225, 231 (1948); *Groves v. Farmers State Bank*, 368 Ill. 35, 12 N.E.2d 618, 623 (1937); *School Committee v. Board of Education*, 363 Mass. 20, 292 N.E.2d 338, 346 (1973); *General Heat & Appliance Co. v. Goodwin*, 316 Mass. 3, 54 N.E.2d 676, 677 (1944); *Dolan v. Hudson*, 83 S.D. 144, 156 N.W.2d 78, 82 (1968).

by this Court dismissing the appeal from the summary judgment for want of jurisdiction and remanding the case to the Court of Appeals for consideration of the appeal as to the attorneys' fee award.

Respectfully submitted,

P. MICHAEL JUNG
STRASBURGER & PRICE
4300 First RepublicBank Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724

Counsel of Record

Of Counsel:

LUTHER MUNFORD
Special Counsel to
Phelps, Dunbar, Marks,
Claverie & Sims
2829 Lakeland Drive
P.O. Box 55507
Jackson, Mississippi 39216-1507

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HARBOR INSURANCE COMPANY,
Plaintiff-Counterclaim,
Defendant-Appellee,

v.

TRAMMELL CROW COMPANY, INC., and Chasewood Construction Company, Defendants-Counterclaim, Plaintiffs-Appellants.

No. 87-1876.

United States Court of Appeals,
Fifth Circuit.

Sept. 6, 1988.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

REAVLEY, Circuit Judge:

Harbor Insurance Company ("Harbor") brought this declaratory judgment action against Trammell Crow and the Chasewood Construction Company (collectively "Chasewood") seeking a declaration that it was not liable to Chasewood under an excess liability policy. Chasewood filed a counterclaim against Harbor seeking contractual and exemplary damages. The district court granted Harbor's motion for summary judgment and awarded attorneys' fees to Harbor. Holding that a genuine issue of material fact exists, we reverse and remand.

I

The controversy is over Harbor's liability to Chasewood on an excess insurance policy (the "policy"). Chasewood's primary insurance carrier was United States Fire Insurance Company ("U.S. Fire"), which provided coverage up to $500,000. Harbor's policy provided excess coverage at levels above $500,000. While Harbor contends that it is not liable because Chasewood did not provide it with timely notice[1] of a suit filed against Chasewood in which the damages sought exceeded $500,000, Chasewood contends that timely notice was provided.

In 1981 Chasewood, a general contractor, entered into subcontracts with the Rico Construction Company ("Rico") which provided that Rico would perform the framing and trim work on an apartment complex in San Antonio. Due to deficiencies in performance and allegations that Rico employees had been stealing materials from the job site, Chasewood terminated its subcontracts with Rico in December 1981.

On May 17, 1982, Rico filed suit against Chasewood alleging breach of contract and seeking $50,000 in damages (the "San Antonio action"). In November 1982, Rico filed a first amended complaint alleging that its reputation had been impaired by Chasewood's termination, and

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[1] The policy requires Chasewood to provide notice to Harbor "as soon as practicable" when Chasewood "has information from which [it] may reasonably conclude that an occurrence covered [under the policy] involves injuries or damages which, in the event that [Chasewood] should be held liable, is likely to involve this policy." *See infra* text at heading II.

in May 1983, in response to Chasewood's discovery requests, Rico alleged damages of at least $300,000 for loss of reputation, integrity and standing in the community. Chasewood notified its primary insurance carrier, U.S. Fire, which, in turn, retained a prominent San Antonio attorney to defend Chasewood against Rico's loss of reputation claim.

On June 9, 1983, Rico filed a second amended complaint in which it characterized Chasewood's conduct as libelous and slanderous and increased its prayer for actual damages to "in excess of $500,000" and requested $1,000,000 in punitive damages. After filing numerous additional amended complaints, Rico filed a seventh amended complaint on August 29, 1983, in which it increased its request for punitive damages to $2,000,000.

On September 22, 1983, the jury in the San Antonio action returned a $2,487,000 verdict in favor of Rico, which included $650,000 in actual damages and $1,750,000 in punitive damages on Rico's libel and slander claim. After remitting $250,000 of the punitive damage award, the state district court entered judgment for Rico on September 26, 1983, which judgment was later affirmed on appeal. On September 27, Chasewood provided Harbor with the first written notice of the adverse judgment. On the following day, Harbor advised Chasewood that it was reserving its rights under the policy.

II

On February 2, 1984, Harbor filed this action against Chasewood seeking a declaratory judgment that it had no obligation to Chasewood under the policy and for reasonable attorney's fees. Chasewood filed a counterclaim against Harbor seeking $1,656,372.66 on the policy, $5,000,000 in exemplary damages, and $150,000 in attorney's fees.

On January 16, 1987, Harbor filed a motion for summary judgment, contending that it was not liable under the policy because Chasewood failed to provide it with timely notice of the San Antonio action. The policy's notice provision specifies that

> Whenever [Chasewood] has information from which [it] *may reasonably conclude* that an occurrence covered [under the policy] involves injuries or damages which, in the event that [Chasewood] should be held liable, is *likely* to involve this Policy, notice shall be sent . . . *as soon as practicable*, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this Policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.

(emphasis added). The policy also provides that while Harbor does not have the right to assume the defense of suits against Chasewood, it has the right "to associate with [Chasewood] or [Chasewood's] underlying insurer, or both, in the defense and control of any claim . . . where the claim . . . involves, or appears reasonably likely to involve [Harbor]."

Responding to Harbor's motion, Chasewood asserted that its duty to provide Harbor with notice of the San Antonio action was not triggered until the jury's adverse verdict was returned on September 22, 1983, because prior to that point it did not possess information from which it could *reasonably conclude* that the San Antonio action would *likely* involve the policy. To support its position, Chasewood introduced numerous excerpts from depositions taken from attorneys involved in the San Antonio action which expressed the opinion, held throughout trial and until the verdict was returned, that Rico's defamation claim was meritless and that Rico's claims would not result in a judgment exceeding $500,000. Chasewood concluded that summary judgment was not appropriate because there were genuine issues of material fact concerning when its duty to provide notice arose and whether notice was provided "as soon as practicable" under the policy. Alternatively, Chasewood contended that Texas law required Harbor to establish that the lack of timely notice resulted in prejudice and that Harbor failed to make this showing.

In an order filed September 14, 1987, the district court granted Harbor's motion for summary judgment. The court first held that compliance with the notice provision is a condition precedent to liability, and that issues concerning the timeliness of notice and prejudice to an insurer are generally questions of fact. *See, Greyhound Corp v. Excess Ins. Co. of Am.*, 233 F.2d 630, 636 (5th Cir. 1956). The court then pointed out that where the facts asserted by the insured, if established, preclude recovery, or where undisputed facts preclude recovery, the question becomes one of law for determination by the court.

See id. Applying the latter rule, the court held that by August 10, 1983,[2] a reasonably prudent person in Chasewood's position, taking all facts and defenses into consideration, would have considered a judgment in excess of $500,000 likely. To support this conclusion, the district court noted that by August 10 Chasewood knew that: (1) Rico's attorney in the San Antonio action was "very able and experienced"; (2) Bexar County juries had awarded verdicts in excess of $500,000 to plaintiffs in libel and slander cases; and (3) Rico's attorney had been successful in obtaining verdicts from Bexar County juries in excess of $500,000. The district court did not discuss any summary judgment evidence favorable to Chasewood's position.[3]

The court, using the August 10 date as a basis, then held that the September 26 provision of notice was not given "as soon as practicable" under the policy. In response to Chasewood's contention that Harbor must

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[2] By August 10, Rico had amended its complaint to allege defamation and had increased its damage request to "in excess of $500,000" in actual damages and $1,000,000 in punitive damages. Discovery had also been completed by this date.

[3] One factor that apparently influenced the court's decision was an admission by Chasewood that by June 1983, based on the pleadings in the San Antonio action, it had information from which it could reasonably conclude that Rico was making a claim which, if proven, would involve the policy. We interpret this admission to mean only that by June 1983, Chasewood was aware that Rico was seeking more than $500,000. This interpretation is supported by the fact that Chasewood did *not* admit that Rico's claims were provable, but instead only admitted that if these claims were proven they would involve the policy.

establish that it was prejudiced by the untimely notice, the court held that Texas law did not require this showing and that, in any event, Harbor had established prejudice.

On September 30, 1987, the district court, pursuant to the parties' consent, referred Harbor's claim for attorney's fees to a magistrate for resolution and entered an interlocutory judgment (on Harbor's motion for summary judgment) pending resolution of the attorney's fees claim. On October 21, 1987, final judgment was entered awarding attorney's fees to Harbor in the amount of $67,747.50. Chasewood timely appealed this judgment.

Citing *Budinich v. Becton Dickinson & Co.*, ___ U.S. ___, 108 S.Ct. 1717, 1720-22, 100 L.Ed.2d 178 (1988), for the proposition that a decision on the merits is "final" for purposes of appeal regardless of whether a request for attorney's fees remains for adjudication, and noting that Chasewood's notice of appeal was not filed within 30 days of the district court's entry of the interlocutory judgment (granting Harbor's summary judgment motion), Harbor contends that we are without jurisdiction to decide this appeal. We reject this contention because, while the district court's judgment did dispose of the merits, it was labeled "interlocutory" and specifically provided that "this Judgment is an Interlocutory Judgment only." We find nothing in the Supreme Court's writing to remove the district court's control of the case and transform its interlocutory order into a final judgment when the latter court chooses to render its final judgment after resolving the attorney's fee issue. Chasewood properly filed notice of appeal from the final judgment.

Chasewood contends that the district court improperly entered summary judgment because a genuine issue of material fact exists concerning when its duty to provide notice to Harbor arose. Chasewood also contends that the district court incorrectly found that Harbor was prejudiced and improperly held that Texas law does not require Harbor to establish prejudice. Finally, Chasewood contends that the district court improperly awarded attorney's fees to Harbor.

We do not reach Chasewood's contentions concerning prejudice and attorney's fees because we hold that summary judgment was improperly granted on the issue of when Chasewood's duty to notify Harbor arose.

III

Summary judgment is proper only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Harbor, as the moving party, had the burden to show that no genuine issue of material fact existed. If this burden was successfully discharged by Harbor, then the burden shifted to Chasewood to counter Harbor's evidence with proof that a genuine issue existed for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir.1985), *reh'g denied*, 762 F.2d 1004 (5th Cir.1985). All reasonable factual inferences from the record must be resolved in favor of the nonmovant, Chasewood. *Galindo*, 754 F.2d at 1216. We are governed by these principles on appeal. *Id.*

Chasewood's summary judgment evidence precludes us from holding that, as a matter of law, the duty to provide notice arose on August 10, 1983. The excess policy required that Chasewood notify Harbor "as soon as practicable" after Chasewood had information from which it "may reasonably [have] conclude[d]" that injuries or damages were likely to involve the policy. The district court had before it summary judgment evidence which showed that: (1) Chasewood's attorneys in the San Antonio action believed that defenses of limitations and lack of publication would prevent Rico's slander claim from going to the jury; (2) Rico's reputation had declined before the alleged slanderous remarks were made by Chasewood, thus leading Chasewood's attorneys to conclude that even if the remarks harmed Rico's business, damages for loss of reputation would not be significant; (3) Chasewood's attorneys never believed that Rico's claims would result in a judgment approaching $500,000; (4) U.S. Fire's (the primary insurer) best estimate of its potential liability never exceeded $25,000; and (5) Rico's only settlement offer was for $350,000, and Chasewood's only settlement offer was for $30,000, both of which fell well below the $500,000 excess policy limit threshold.

This evidence clearly suggests that, until September 22, 1983, when the jury returned its verdict, a reasonably prudent person in Chasewood's position may have concluded that the potential damages in the San Antonio action were not likely to involve Harbor's policy. While Harbor introduced, and the district court relied upon, evidence to suggest otherwise, we cannot say that a genuine issue of material fact did not exist on this issue. Our conclusion is supported by *Trustees of Univ. of Pa. v.*

Lexington Ins. Co., 815 F.2d 890 (3d Cir. 1987), a case involving identical policy language in which, on the issue of timely notification by an insured to its insurer of a prior action, the jury found for the insured under circumstances comparable to those presented on this appeal. *Id.* at 895.

Harbor does not attack Chasewood's summary judgment evidence, but instead contends that under two alternate interpretations of the policy's notice provision either all or some of Chasewood's evidence should not be considered. Harbor first argues that the notice provision required Chasewood to provide notice when it possessed information from which it could reasonably conclude that injuries or damages involving the policy were likely *"in the event that [Chasewood] should be held liable."* Harbor construes this provision to mean that, in determining the likelihood that injuries or damages will involve the policy, Chasewood is not permitted to take into consideration any doubts about whether liability will be imposed but must instead assume liability. Based on this interpretation, Harbor contends that Chasewood's summary judgment evidence concerning its attorneys' belief that liability would not be imposed on Rico's libel and slander claim, is irrelevant to the notice issue and should not be considered.

Under Texas law, it is well settled that insurance policies are to be liberally construed in favor of the insured and strictly against the insurer, especially when exceptions and words of limitation are involved. *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344, 349 (Tex.1976). Texas courts apply the construction which

favors the insured and permits recovery when the language of a policy is susceptible to more than one reasonable interpretation. *Id.* If not unreasonable, the insured's interpretation controls. *Ideal Mutual Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1238 (5th Cir.1986) (relying on *Continental Casualty Co. v. Warren*, 254 S.W.2d 762, 763 (Tex.1953)).

Applying these principles, we find Harbor's construction untenable because it reads out the remainder of the notice provision, which specifies that "failure to give notice of any occurrence which at the time of its happening did not appear to involve this Policy but which at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims." Taking this language into account, Chasewood interprets the provision to mean that it must consider the possibility of liability, as well as the potential amount of damages, when assessing the likelihood that injuries or damages will involve the policy. We cannot say that this construction is unreasonable. Even if it were, a genuine issue of material fact would still exist because Chasewood's remaining summary judgment evidence includes the statements by the Chasewood attorneys that, until the jury returned its verdict in the San Antonio action, they did not believe that a judgment exceeding $500,000 was likely. For summary judgment purposes we assume their credibility.

Noting that the policy requires Chasewood to notify Harbor when it *"has information from which* [it] may reasonably conclude . . . ," Harbor contends that all of Chasewood's summary judgment evidence is irrelevant to the notice issue because, based solely on the evidence

considered by the district court (Harbor's summary judgment evidence), Chasewood had sufficient information by August 10, 1983, to reasonably conclude that its duty was triggered. In other words, Harbor interprets the policy to require notice whenever Chasewood has information sufficient to implicate coverage, even though Chasewood may posess other contrary information which suggests that its duty has not been triggered. We regard that reading of the policy as tortured.

Chasewood interprets the policy to mean that its duty to provide notice arises when a reasonable person, viewing *all* available facts and information, would conclude that an award implicating the policy is likely. We conclude that this interpretation is reasonable, and accordingly hold that all information known to Chasewood during the San Antonio action is relevant to the notice issue.

Harbor's proposed interpretations of its policy would virtually require that Chasewood provide it with notice whenever a claim exceeding $500,000 was filed against Chasewood. The phrase "may reasonably conclude" and the term "likely," as used in the policy, do not support this result. Harbor could have drafted its policy language narrowly to obtain the result it now seeks to impose, but did not do so. *See, Members Mutual Ins. Co. v. Cutaia,* 476 S.W.2d 278, 278 (Tex.1972) (policy requiring insured to notify insurer of "any" accident); *Greyhound,* 233 F.2d at 632 (policy requiring insured to notify insurer of "any accident which may involve [insurer's] liability").

Because we hold that a genuine issue of material fact exists concerning when Chasewood's duty to notify Harbor arose under the policy, we reverse the district court's

entry of summary judgment and remand for further proceedings.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1876

D.C. Docket No. CA3-84-166-G

HARBOR INSURANCE COMPANY,

Plaintiff-Counterclaim
Defendant-Appellee,

versus

TRAMMELL CROW COMPANY, INC., and
CHASEWOOD CONSTRUCTION COMPANY,

Defendants-Counterclaim
Plaintiffs-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

JUDGMENT
[Filed Sept. 6, 1988]

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-counterclaim defendant-appellee pay to defendants-counterclaim plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

September 6, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARBOR INSURANCE COMPANY, Plaintiff, VS. TRAMMEL CROW CO., INC., and THE CHASEWOOD CONSTRUCTION COMPANY, Defendants.	)	CIVIL ACTION NO. CA 3-84-0166-G

MEMORANDUM ORDER
[Filed Sept. 14, 1987]

Plaintiff Harbor Insurance Company ("Harbor") moves for summary judgment under Fed. R. Civ. P. 56 on its complaint for declaratory judgment and its answer to the counterclaim of Trammel Crow Co., Inc. ("Crow") and The Chasewood Construction Company ("Chasewood"). The court has carefully reviewed the motion and all related submissions and is of the opinion that the motion should be GRANTED.

I. *Undisputed Facts*

1. On or about May 13, 1981, Harbor issued an Umbrella Liability Policy (the "Policy") to Crow and others, including Chasewood.

2. Through the Policy, Harbor agreed, subject to the limitations, terms and conditions of the Policy, to indemnify defendants for all sums which defendants were obligated to pay by reason of liability imposed by law for

damages resulting from, among other things, libel, slander and defamation of character.

3. The limits of liability in the Policy were $5,000,000 (per occurrence and in the aggregate) beyond the coverage provided by the underlying comprehensive general liability policy issued to the defendants by U.S. Fire Insurance Co. ("U.S. Fire"), which had limits of $500,000 per occurrence and in the aggregate.

4. The Policy was expressly made subject to a number of conditions, including the following:

G. NOTICE OF OCCURRENCE

Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the insured should be held liable, is likely to involve this Policy, notice shall be sent as stated in Item 3 of the Declarations as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this Policy but which at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.

H. ASSISTANCE AND CO-OPERATION

The Company [Harbor] shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all

things in the defense of such claim, suit or proceeding.

5. On or about April 26, 1981, Rico Construction Co. ("Rico Construction") entered into a subcontract with Chasewood whereby Rico Construction agreed to perform the framing work on an apartment complex which Chasewood was building in San Antonio, Texas.

6. On or about October 12, 1981, Rico Construction agreed, by separate contract, to do the trim work on the same project.

7. During the latter part of November, 1981, two of Chasewood's employees, Michael Hope ("Hope") and Paul Clarkson, visited the job site and were advised that one of Rico Construction's employees had been stealing materials from the job on the previous day. During an ensuing investigation, the missing materials were allegedly discovered in a garage belonging to an employee of Rico Construction.

8. On or about December 1, 1981, Hope met with David Rico ("Rico"), owner of Rico Construction, at which time Rico was told that Rico Construction's contracts would be terminated unless the missing materials were returned. Rico denied that any materials had been stolen. Rico was then informed that his contracts with Chasewood were terminated.

9. On May 17, 1982, Franklin D. Houser ("Houser") filed suit ("the San Antonio Action") on behalf of Rico and Rico Construction against Chasewood in cause number 82CI-07486 in the 150th Judicial District Court of Bexar County, Texas.

10. On November 30, 1982, a first amended petition was filed in the San Antonio Action which, for the first time, alleged claims of libel and slander against Chasewood.

11. After that first amended petition was filed, Alexander & Alexander of Texas, Inc. ("Alexander & Alexander") was given notice of the San Antonio Action and the allegations of libel and slander. Alexander & Alexander thereafter provided notice of the San Antonio Action to U.S. Fire, which hired counsel to represent Chasewood in that lawsuit.

12. On June 9, 1983, plaintiffs in the San Antonio Action filed a second amended petition, which expanded on the libel and slander allegations and amended the *ad damnum* clause to seek actual damages in excess of $500,000 and punitive damages of $1,000,000 as a result of Chasewood's conduct. Other amended petitions were subsequently filed providing more detail concerning the claims of libel and slander and ultimately seeking punitive damages of $2,000,000.

13. On or about September 12, 1983, trial of the San Antonio Action began. On September 22, 1983, the jury returned a verdict in favor of Rico for a total of $2,487,000 (including $650,000 in actual damages and $1,750,000 in punitive damages for libel and slander). After requiring a remittitur of $250,000 of the punitive damages award, the trial court rendered judgment in favor of Rico on September 26, 1983 but back dated it to September 23, 1983.

14. Harbor first received notice of the San Antonio Action, and the occurrence giving rise to it, on September 27, 1983, after the judgment had already been entered.

The next day, Crow and Chasewood were advised by telex that Harbor was reserving its rights under the policy.

15. On or before June 15, 1983, Chasewood realized that Rico was seeking to recover damages in excess of $500,000 from Chasewood based on allegations of libel and slander.

16. On February 2, 1984, Harbor filed this action requesting the court to declare that Harbor has no obligation under the Policy to indemnify either Crow or Chasewood for any sums which Crow or Chasewood may have paid on the judgment in the San Antonio Action.

17. In this action, Crow and Chasewood seek recovery of more than $1,650,000, in a counterclaim against Harbor, on the basis that Harbor breached its obligations under the Policy.

II. *Issues of Law*

Harbor has presented the following questions of law which, it asserts, entitle it to summary judgment.

1. Under Conditions G and H of the Policy, on what date did defendants' duty to give Harbor notice of the San Antonio Action arise?

2. Did the defendants give notice "as soon as practicable" after their duty to do so arose?

3. Does Harbor have to show prejudice in order to rely on a late notice defense?

4. If so, has Harbor been prejudiced by the defendants' late notice?

III. *Analysis*

A. *Standards for Summary Judgment*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g.*, Galindo v. Precision American Corporation, 754 F.2d 1212, 1216 (5th Cir. 1985); Albertson v. T.J. Stevenson & Company, Inc., 749 F.2d 223, 228 (5th Cir. 1984).

In considering a motion for summary judgment, the court must evaluate the entire record and indulge every reasonable inference in favor of the party opposing the motion. Powers v. Nassau Development Corporation, 753 F.2d 457, 462 (5th Cir. 1985); Trevino v. Celanese Corporation, 701 F.2d 397, 407 (5th Cir. 1983).

Nevertheless, the party opposing the motion must show that there exists a genuine issue of material fact for trial. *See* Celotex Corporation v. Catrett, ___ U.S. ___, 106 S.Ct. 2548, 2552-53 (1986):

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled

to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Similarly, in Fontenot v. Upjohn Company, 780 F.2d 1190 (5th Cir. 1986), the court held that unless the party opposing a motion for summary judgment is able to show that there exists a material issue of fact requiring a trial, the motion for summary judgment should be granted. The court stated: "Absent evidence, direct, circumstantial, or inferential, that would create a genuine issue of fact, and absent any suggestion concerning the utility of additional time for further discovery, the motion should be granted." *Id.* at 1196.

B. *Discussion*

1. *Duty to Give Notice*

Condition G of the Policy requires that Harbor be given notice of any occurrence once the insured has information from which the insured may reasonably conclude that an occurrence involves injuries or damages which, in the event that the insured should be held liable, is likely to involve the Policy. Condition H of the Policy obligates the insured to provide Harbor with the opportunity to associate with the insured or the insured's underlying insurers, or both, in the defense of any claim, suit, or proceeding where it involves, or appears reasonably likely to involve, Harbor.

In connection with an insured's duty to give notice to an excess carrier, defendants agree with plaintiff's assertion that the defendants are bound by the knowledge possessed by the defendants' own attorneys. Response to

Plaintiff's Motion for Summary Judgment, p. 11; *see* Arkwright-Boston Manufacturers Mutual Insurance Company v. Bauer Dredging Company, Inc., 1978 A.M.C. 1570, 1583 (S.D. Tex. 1978) (applying Texas law).

In Texas, when an insured takes it upon itself to determine whether or not an incident warrants the giving of notice, it does so at the risk of foregoing a claim against the carrier. *See, e.g.*, Circle 4 Stables, Inc. v. National Surety Corporation, 451 S.W.2d 564, 567 (Tex. Civ. App.-Amarillo 1970, writ ref'd n.r.e.).

Normally, an excess insurer does not undertake to defend the insured. The excess insurer is not interested in every accident, but only those that may be serious enough to involve its coverage. Excess policies, consequently, usually require an insured to give notice of claims that appear likely to involve the excess policy. The exercise of whatever judgment is required to evaluate the case falls upon the insured. The provision is a condition precedent to liability. Upon receiving notice, the excess carrier can take such steps as it sees fit to protect its own interests.

Whether the notice was given in proper time and whether the excess insurer was prejudiced by any delay are generally questions of fact. Greyhound Corporation v. Excess Insurance Company of America, 233 F.2d 630, 636 (5th Cir. 1956). However, where the facts as asserted by the insured, if established, preclude recovery, or where undisputed facts preclude recovery, then the question becomes one of law for determination by the court. *Greyhound Corporation v. Excess Insurance Company of America,*

above, 233 F.2d at 636. *See also Arkwright-Boston Manufacturers Mutual Insurance Company v. Bauer Dredging Company, Inc.*, above, 1978 A.M.C. at 1580-84 (involving "Notice of Occurrence" and "Assistance and Cooperation" clauses virtually identical to those at issue here).

Defendants maintain that substantial evidence shows Chasewood had no reason to believe that a judgment would be entered in excess of $500,000, so that Chasewood had no duty under the Policy to notify Harbor. The undisputed facts, as well as defendants' own interpretation of the Policy, however, belie this contention.

The court is of the opinion that, no later than August 10, 1983, taking all facts and defenses into consideration, a reasonably prudent person would have considered a judgment in excess of $500,000 likely. Chasewood acknowledges that no later than June 15, 1983, it was aware that it was being sued for a sum in excess of its primary policy. Rico was represented in the San Antonio action by Houser, a very able and experienced San Antonio trial counsel. Bexar County juries had awarded verdicts in excess of $500,000 to plaintiffs in libel and slander cases. Houser had been successful in obtaining verdicts from Bexar County juries in excess of $500,000.

Chasewood knew that it was being sued for maliciously defaming and ruining the business of one of the two most competent (according to Chasewood) framing subcontractors in San Antonio. Chasewood knew that Rico's claim for damages had grown with the passage of time. Formal discovery in the San Antonio Action was effectively concluded by August 10, 1983. Certainly, if Chasewood were held liable, as Condition G of the policy

required it to assume, Chasewood knew or should have known that the occurrence giving rise to the San Antonio Action involved injuries or damages likely to involve the Policy.

Chasewood admits that in June of 1983, based on the pleadings of the San Antonio Action, it "had information from which it could reasonably conclude that Rico was making a claim . . . which, if proven, would involve the Policy." Second Request No. 16. In the original petition filed by defendants in Cause No. 85-7399-L, Chasewood Construction Co., et al. v. Alexander and Alexander, et al. ("Plaintiffs' Original Petition"), pending in the 193rd District Court of Dallas County, Texas, defendants confirm that they understood that they were required under the policy to give Harbor notice " . . . of the pendency of any suit or action wherein damages could be recovered in excess of $500,000." Plaintiffs' Original Petition, p. 4. Accordingly, as a matter of law, Chasewood's duty to give notice of the San Antonio Action arose no later than August 10, 1983.

Defendants specifically admit that they did not advise Harbor of the San Antonio Action until September 26, 1983, and that they knew of no individual or entity which claims to have done so. Second Request Nos. 2 and 3. Defendants contend that Alexander & Alexander was notified in August 1983 that the amount sought in the San Antonio Action was in excess of $500,000. Defendants also contend that Alexander & Alexander was an agent of Harbor for the purpose of receiving notice of the suit and the excess claim. There is no evidence before this court, however, that even hints of such an agency relationship. *See* affidavit of Nick Wahl, dated January 13, 1987, pp.

2-3. Under the facts of this case, Alexander & Alexander was acting as defendants' insurance broker, not Harbor's agent. When Alexander & Alexander received notice of the San Antonio Action, it did so as defendants' agent and not as the agent for Harbor. *See, e.g., Arkwright-Boston Manufacturers Mutual Insurance Company v. Bauer Dredging Company, Inc.*, 1978 A.M.C. at 1583-84; Plaintiffs' Original Petition, p. 4. As a matter of law, notice to Alexander & Alexander did not constitute notice to Harbor.

Texas courts are in agreement that an insurance policy's requirement that notice be given "as soon as practicable" is an enforceable provision. *E.g.*, Employers Casualty Company v. Mireles, 520 S.W.2d 516, 522 (Tex. Civ. App.-San Antonio 1975, writ ref'd n.r.e.). "As soon as practicable" means notice within a reasonable time, although what is reasonable depends on the facts and circumstances of each particular case. Employers Casualty Company v. Scott Electric Company, 513 S.W.2d 642, 645 (Tex. Civ. App.-Corpus Christi 1974, no writ). Where the facts are undisputed and no excuse is offered for a delay, what constitutes a reasonable time is a question of law for the court. Klein v. Century Lloyds, 275 S.W.2d 95, 97 (Tex. 1955). Texas courts have consistently held, as a matter of law, that delays in giving notice of 28 days or more are not "as soon as practicable". *See, e.g., Klein v. Century Lloyds*, above, 275 S.W.2d at 97; Commercial Standard Insurance Company v. Harper, 103 S.W.2d 143, 146 (Tex. 1937). Chasewood waited, at a minimum, 48 days after its duty arose to give Harbor notice of the San Antonio Action. As a matter of law, Chasewood failed to given Harbor notice "as soon as practicable."

The common law of Texas does not require an insurer to show prejudice in order to rely on a late notice defense. *See, e.g.*, Highlands Insurance Company v. Employers' Surplus Lines Insurance Company, 497 F.Supp. 169, 172 (E.D. La. 1980) (applying Texas law). Nor is it clear that the Texas State Board of Insurance has mandated a showing of prejudice in situations involving excess insurance policies. Nevertheless, the court is persuaded that in this case Harbor has suffered prejudice as a matter of law.

In an excess policy, the primary purpose of the notice provision is to give the carrier the opportunity to associate itself with the underlying insurer in the defense and control of a claim so that the excess carrier can assure itself that its interest are being protected. *See, e.g., Greyhound Corporation v. Excess Insurance Company of America,* above, 233 F.2d at 636. When an excess carrier loses the opportunity to assist in the control and defense of a claim, it is prejudiced.

In this case, Harbor was not notified of the San Antonio Action until after judgment; its liability was presented as a *fait accompli.* Harbor bargained for the ability to participate in the defense and control of a claim and its evaluation for settlement purposes. This is what Harbor lost when defendants failed to give Harbor notice of the San Antonio Action until after judgment. As a matter of law, therefore, Harbor was prejudiced. *See, e.g.,* Ralston Purina Company v. Home Insurance Company, 760 F.2d 897, 899-900 (8th Cir. 1985); *Arkwright-Boston Manufacturers Mutual Insurance Company v. Bauer Dredging Company, Inc.,* above, 1978 A.M.C. at 1584-85.

IV. *Conclusion*

For the foregoing reasons, the court concludes that Harbor's motion for summary judgment should be GRANTED. Within ten days of the date of this order, Harbor shall submit a proposed form of judgment consistent with this memorandum order.

SO ORDERED.

September 14, 1987.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARBOR INSURANCE COMPANY, Plaintiff, VS. TRAMMEL CROW and THE CHASEWOOD CONSTRUCTION COMPANY, Defendants.	)	CIVIL ACTION NO. CA 3-84-0166-G

INTERLOCUTORY JUDGMENT
[Filed Sept. 30, 1987]

By Memorandum Order dated September 14, 1987, this Court granted the Motion for Summary Judgment of Plaintiff, Harbor Insurance Company, and the Court being of the opinion that an Interlocutory Judgment should be entered pending a resolution of Harbor's claim for attorney's fees against Defendants Trammell Crow (mistakenly identified as Trammel Crow Co. Inc., in the style of this case) and The Chasewood Construction Company, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that neither of the Defendants is entitled to recover of or from Harbor Insurance Company the face amount, or any part thereof, of the Harbor Umbrella Liability Policy bearing Policy No. HI153214, issued by Plaintiff to Defendants on or about May 13, 1981; and that Plaintiff is not obligated under said policy of insurance to pay the Judgment, or any part thereof, entered in Cause No. 82CI-07486 by the 150th Judicial District Court of Bexar County, Texas, in

favor of David R. Rico and Rico Construction Company against Chasewood Construction Company; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Trammell Crow and The Chasewood Construction Company, do have and recover nothing of and from Harbor Insurance Company; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment is an Interlocutory Judgment only and shall have no effect whatsoever on Harbor's claim for attorney's fees, which claim shall be heard at the time and in the manner required by future Orders of this Court.

SIGNED this 30 day of September, 1987.

/s/ A. Joe Fish
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARBOR INSURANCE COMPANY	)	
VS.	)	CIVIL ACTION NO.
TRAMMEL CROW and THE CHASEWOOD CONSTRUCTION COMPANY	)	CA 3-84-0166-G

JUDGMENT
[Filed Oct. 21, 1987]

By Memorandum Order dated September 14, 1987 this Court granted the motion of summary judgment of Plaintiff, Harbor Insurance Company. Subsequent thereto, on October 21, 1987, an evidentiary hearing was held before the undersigned Magistrate on Harbor's claim for attorney's fees, all by written consent of all parties. At such hearing, the parties were represented by counsel of record. And having received the evidence and having heard the arguments of counsel,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that neither Trammel Crow nor the Chasewood Construction Company is entitled to recover of or from Harbor Insurance Company the face amount, or any part thereof, of the Harbor Umbrella Liability Policy bearing Policy No. HI153214, issued by Harbor to Trammel Crow and the Chasewood Construction Company on or about May 13, 1981; and that Harbor is not obligated under said policy of insurance to pay the judgment, or

any part thereof, entered in Cause No. 82CI-07486 by the 150th Judicial District Court of Bexar County, Texas, in favor of David R. Rico and Rico Construction Company against Chasewood Construction Company; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Harbor do have and recover of and from Defendants Trammel Crow and the Chasewood Construction Company, jointly and severally, reasonable attorney's fees in the amount of $67,747.50, together with interest thereon in the amount of 7.88 per cent from the date of judgment, for services rendered in the prosecution of this action through the date of this judgment.

All costs of Court expended or incurred in this cause are hereby adjudged against Defendants, Trammel Crow and the Chasewood Construction Company, jointly and severally. All writs and processes for the enforcement and collection of this judgment or the costs of Court may issue as necessary. All relief not expressly granted herein is denied.

SIGNED this 21st day of October, 1987.

/s/ John B. Tolle
UNITED STATES MAGISTRATE